84-1480

Case No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

LOUIE L. WAINWRIGHT, Secretary
Department of Corrections,
State of Florida,

Petitioner,

v.

DAVID WAYNE GREENFIELD,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
AND APPENDIX

BRIEF OF PETITIONER ON JURISDICTION

JIM SMITH
ATTORNEY GENERAL

ANN GARRISON PASCHALL
Assistant Attorney General
1313 Tampa, Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

1. Whether a defendant's post-Miranda warning behavior, including silence, may be used as substantive evidence of his sanity at or near the time of the offense when that defendant elects to present an insanity defense, as held by the Seventh Circuit Court of Appeals in Sulie v. Duckworth, 689 F.2d 128 (7th Cir. 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 1439, 75 L.Ed.2d 796 (1983) and implicitly held by the Tenth Circuit Court of Appeals in United States v. Trujillo, 578 F.2d 285 (10th Cir. 1978), cert. denied, 439 U.S. 858, 99 S.Ct. 175, 58 L.Ed.2d 166 (1978) or whether such use of post-Miranda silence is violative of Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) as held by the Court of Appeals in the instant case.

2. Whether the Court of Appeals decision in the instant case which reached this cause on the merits is in conflict with this Court's decision in Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 249, 53 L.Ed.2d 594 (1977), where Respondent's claim was barred by his failure to comply with Florida's contemporaneous objection rule.

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OTHER AUTHORITIES CITED

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is reported as Greenfield v. Wainwright, 741 F.2d 329 (11th Cir. 1984) (rehearing denied January 28, 1985) and appears in the appendix at A 1 - 34.

The opinion of the District Court of Appeal, Second District of Florida is reported as Greenfield v. State, 337 So.2d 1021 (Fla. 2 DCA 1976) and appears in the appendix at A 44 - A 54. The memorandum opinion of the Florida Supreme Court remanding this cause to the District Court of Appeal is reported as Greenfield v. State, 364 So.2d 885 (Fla. 1978) and appears in the appendix at A 55 - A 56.

JURISDICTION

On September 6, 1984, the United States Court of Appeals for the Eleventh Circuit reversed and remanded an Order of

the United States Court for the Middle District of Florida denying a petition for writ of habeas corpus brought by a state prisoner pursuant to 28 U.S.C. §2254. A timely petition for rehearing was summarily denied on January 28, 1985.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V of the Constitution of the United States provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a capital Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property,

> without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV of the Constitution of the United States provides inter alia, that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Title 28 U.S.C. §2254(a) provides that:

> The Supreme Court, a justice thereof, a circuit judge or a District Court shall entertain an application for a Writ of Habeas Corpus in behalf of a person in custody pursuant to the judgment of a State Court only

on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

On June 26, 1975, the office of the State Attorney of the Twelfth Judicial Circuit, in and for Sarasota County, Florida filed a direct information against DAVID WAYNE GREENFIELD charging him with sexual battery committed with force likely to cause serious personal injury. Greenfield entered a plea of not guilty on July 11, 1975. This plea was changed to not guilty by reason of insanity on August 15, 1975. A Statement of Particulars in support of the insanity defense was filed October 9, 1975.

A trial by jury was held on two days, October 14, and 15, 1975. At trial, Greenfield pursued his insanity defense.

During direct examination, Officer Pilifant testified that he read Greenfield the Miranda rights (R 77); and that Greenfield refused to talk with him before consulting an attorney. (R 77 - 78) The defense registered no objection to this testimony. In closing arguments, the prosecutor made reference to the testimony of Officer Pilifant summarized in the following manner:

> "Lets go on to Officer Pilifant who took the stand, who the psychiatrists, both defense psychiatrists, never even heard about, never even talked to. He states that he saw this fellow on the beach and that he went up to him, talked to him and then arrested him for the offense. The fellow voluntarily put his arms behind his back and said he would go to the car. This is supposedly an insane person under the throws of an acute condition of schizophrenic paranoia at the time. He goes to the car and the officer reads him his Miranda rights. Does he say he doesn't understand them? Does

> he say 'what's going on?' No. he says 'I understand my rights. I do not want to speak to you. I want to speak to an attorney.' Again an occasion of a person who knows what's going on around his surroundings, and knows the consequences of his act. Even down -- as going down the car as you recollect Officer Pilifant said he explained what Miranda rights meant and the guy said -- and Mr. Greenfield said 'I appreciate that, thanks a lot for telling me that.' And here we are to believe that this person didn't know what he was doing at the time of the act, and then even down at the station, according to Detective Jolley - he's down there. He says, 'have you been read your Miranda rights?' 'Yes, I have.' 'Do you want to talk.' 'No.' 'Do you want to talk to an attorney?' 'Yes.' And after he talked to the attorney again he will not speak. Again another physical overt indication by the defendant --" (R 338 - 339)

Greenfield tendered an objection to this line of argument but Greenfield did not tender a Motion to Strike or a Motion for Mistrial. Similarly, Greenfield did not

request curative instructions. (R 339)

A verdict of guilty as charged was returned and, in an order filed November 21, 1975, Greenfield was adjudicated guilty and sentenced to life imprisonment.

Notice of Appeal was timely filed on November 21, 1975. By an opinion filed September 24, 1976, the District Court of Appeal, Second District, affirmed the judgment and sentence of the trial court. A petition for rehearing was filed on October 6, 1976, and denied October 25, 1976. Greenfield v. State, 337 So.2d 1021 (Fla. 2 DCA 1976) (A 44 - A 54) At this point, a Petition for Writ of Certiorari was filed in the Florida Supreme Court.

By an order filed March 7, 1977, the Florida Surpeme Court granted Greenfield Peitition for Writ of Certiorari and jurisdiction transferred to the Florida

Supreme Court. That Court then remanded the case to the District Court of Appeal, Second District for proceedings consistent with its decision in Clark v. State, 363 So.2d 331 (Fla. 1978). (A 55 - A 56) After such proceedings, the Second District Court of Appeal entered an order ruling that its initial opinion in Greenfield was consistent with Clark v. State, supra. and reaffirmed its original opinion. (A 57 - A 58)

Greenfield next sought federal habeas corpus relief claiming a violation of his Fifth Amendment rights by the prosecutor's reference to and use of Greenfield's post-arrest silence during trial and final argument. The federal district court denied relief (A 35 - A 43) and Greenfield appealed to the Eleventh Circuit. The Eleventh Circuit reversed, holding that

post-arrest silence could not be utilized to rebut an insanity defense.

BASIS OF FEDERAL JURISDICTION

The basis of federal jurisdiction in the court of first instance was a petition for writ of habeas corpus filed pursuant to 28 U.S.C. §2254.

REASONS FOR GRANTING THE WRIT

A. THE DECISION BELOW, HOLDING THAT A DEFENDANT'S POST-ARREST SILENCE CANNOT BE USED TO REBUT AN INSANITY DEFENSE, IS IN CONFLICT WITH THE DECISIONS OF THE SEVENTH AND TENTH CIRCUITS ON AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHICH HAS NEVER BEEN ADDRESSED BY THIS COURT.

In the case at bar, the Court of Appeals relied on this Court's opinion in Doyle v. Ohio, 426 U.S. 610,49 L.Ed.2d 91, 96 S.Ct. 2240 (1976), and held that the use of Greenfield's post-Miranda warning conduct, including his silence, as proof of sanity entitled Greenfield to a new

trial.[1] In ruling as it did, the Court of Appeals noted that both the Seventh and the Tenth Circuits have held that Doyle is inapposite in the context of an insanity defense. Sulie v. Duckworth, 689 F.2d 128 (7th Cir. 1982), cert. denied, 460 U.S. 1043, 103 S .Ct. 1439, 75 L.Ed.2d 796 (1983); United States v. Trujillo, 578 F.2d 285 (10th Cir. 1978), cert. denied, 439 U.S. 858, 99 S.Ct. 175, 58 L.Ed.2d 166 (1978).[2]

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1 The Court of Appeals specifically held that the harmless error doctrine espoused in Chapman v. California, 368 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) did not apply because the prosecutor relied heavily on Greenfield's conduct as evidence of sanity. Petitioner does not challenge that ruling here.

2. At least one state supreme court has utilized the same constituional analysis contained in the Court of Appeals' Greenfield opinion. State v. Burwick, 442 So.2d 944 (Fla. 1983), cert. denied, __ U.S. __, 104 S.Ct. 1719, 80 L.Ed.2d 191 (1984)

In Sulie, the Seventh Circuit approved the use of the defendant's post-Miranda request for an attorney to establish sanity, and held:

> Against the slight inhibiiting effect on the constitutional right of silence of permitting testimony that a criminal defendant requested counsel at his interrogation, we must weigh the value to the state of being able to show that, when interrogated soon after the crime, the defendant who now claims he was insane when he committed the crime was sufficently lucid to ask for a lawyer.
>
> Id. at 130

In United States v. Trujillo, supra, the court permitted the introduction of the defendant's post-Miranda pronouncement that he did not wish to make any statement until he had consulted an attorney, as well as defendant's responses thereafter to the officer's continued interrogation. In holding that testimony admissible, the

Tenth Circuit stated:

> The agent's testimony that defendant did not want to make a statement until he consulted a lawyer was factual and not controverted. The issue in the case, properly raised by a pretrial notice, was the defense of insanity at the time of commission of the offense charged.
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> * * * * * * * * * * * * * * * * *
>
> Post arrest silence may be pertinent to a claim of insanity. United States v. Julian, 10th Cir. 450 F.2d 575 - 579; see also United States v. Coleman, 10th Cir. 501 F.2d 342, 346. In the circumstances presented, defendant's request for a lawyer and his answers to the personal identification questions disclosed understanding and awareness proper for consideration in determining his sanity. The danger of unfair prejudice is minimal and the probative value substantial. See Rule 403, Federal Rules of Evidence. The trial court properly denied the motion for mistrial because of the agent's testimony.

Id. at 578 F.2d 288.

Similarily, in Jacks v. Duckworth, 651 F.2d 480 (7th Cir. 1981), the court of

appeals held that a trial court had properly allowed an illegally obtained tape recording to be used both "to determine the credibility of [the defendant] and his mother and on the issue of [the defendant's] sanity, but not as to whether [the defendant] had committed the crime charged." Id. at 484 (emphasis omitted). In Kaufman v. United States, 350 F.2d 408 (8th Cir. 1965), cert. denied, 383 U.S. 951 (1966) the court through Judge (now Justice) Blackmun, held that testimony concerning interviews between an FBI agent and the defendant allegedly conducted in violation of Massiah v. United States, 377 U.S. 201 (1964), was properly admitted, not "in the prosecution of the offense" but as "rebuttal to the insanity defense which by then Kaufman had projected into the case." 350 F.2d at 415. But see

United States v. Hinckley, 672 F.2d 115 (D.C. Cir. 1982).

A good comparison can be made with regard to this Court's refusal to suppress illegally obtained evidence offered to impeach an accused who testified in his own defense. United States v. Havens, 446 U.S. 620, 626 (1980) and Harris v. New York, 401 U.S. 222 (1971). The principle espoused therein applies with equal force to the evidence which the State seeks to use generally to rebut an affirmative defense. Refusal to exclude such evidence leaves wholly intact the State's obligation to prove the defendant's guilt in its case-in-chief without relying on unlawfully obtained evidence or violating a defendant's right to remain silent. Once, however, a defendant affirmatively presents evidence (or a defense), there is no

rational basis upon which to deny the trier of fact probative reliable evidence on the issue of guilt, or, at bar, on the continuing viability of Greenfield's affirmative defense. There is even less justification to suppress evidence relevant to the defense of insanity. Insanity presupposes that the accused has "committed all the elements of a prescribed offense," United States v. Scott, 437 U.S. 82, 97 - 98 (1978). Consequently, courts have recognized the similarity between using illegally obtained evidence for the narrow purpose of impeachment and using it only as bearing upon the insanity defense in that it was asserted to be evidence of rationality contemporaneous to the crime. See Barkley v. United States, 323 F.2d 804, 806 (D.C. 1963). As observed in Michigan v. Tucker, 417 U.S. 433, (1974),

insanity, more than any other defense, exemplifies the need, "when balancing the interests involved, (to) weigh the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce . . . " Id. at 417 U.S. 450.

Implicit in a careful scrutiny of Doyle and United States v. Hale, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975) is the fact that the right protected by these cases is a defendant's right to preclude the trial jury from inferring his guilt of a substantive offense based on evidence of post-Miranda silence. This Court has not raced to extend the holding of Doyle and Hale. In Fletcher v. Weir, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982) this Court declined to hold

that the use of post-arrest, pre-Miranda silence against a defendant was constitutionally impermissible. Nor is use of pre-arrest, pre-Miranda silence improper. Jenkins v. Anderson, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980).

The Eleventh Circuit's extension of the Doyle holding in the case at bar is not supported by the opinions of this Court. The Court of Appeals itself remarked in its opinion that this Court has never addressed the issue presented here. Greenfield v. Wainwright, supra at 333. The number of opinions in the Courts of Appeals touching on this subject clearly demonstrate that this issue is a recurring problem. That fact, together with the conflict among the courts addressing this issue plainly shows the need for this Court to speak to this issue and correct

the Eleventh Circuit's unwarranted extension of Doyle.

B. THE DECISION BELOW IGNORES THE DICTATES OF WAINWRIGHT V. SYKES, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) BY HOLDING THAT GREENFIELD'S FAILURE TO COMPLY WITH FLORIDA'S CONTEMPORANEOUS OBJECTION RULE MAY BE EXCUSED BY THE NUMBER OF HIS SUBSEQUENT UNTIMELY OBJECTIONS.

It is beyond dispute that Greenfield never contemporaneously objected to the testimony of Officers Jolley and Pilifant regarding Greenfield's post-Miranda conduct. It is only when the prosecutor argued this evidence to the jury that Greenfield's counsel saw fit to object -- once (R 339) The Court of Appeals has stated, in its opinion in this cause:

> Under these circumstances the Petitioner's failure to object to the introduction of this evidence did not preclude his right to seek appellate review of the evidence's admissiblity because he later made 20 objections to

> the prosecutor's attempt to argue the evidence to the jury. Greenfield v. Wainwright, 741 F.2d 329, 331 (11th Cir. 1984), footnote 1.

While Petitioner questions the conclusion that the mere number of subsequent objections can excuse a non-compliance with Florida's contemporaneous objection rule and thus avoid the Wainright v. Sykes bar, Petitioner must also note that a review of the record discloses one not twenty trial objections to the prosecutor's argument on this point. That ojection is contained at page 339 of the state trial transcript. The trial transcript further reflects Greenfield's failure to move for a mistrial at the time the allegedly improper argument was made.

It is clear, as a matter of Florida law that if a defendant, at the time an improper comment is made, does not move

for mistrial, he cannot, after trial, in the event he is convicted, expect a reversal on appeal. A defendant will not be allowed to await the outcome of the trial with the expectation that if he is found guilty, his conviction will be automatically reversed. Clark v. State, 363 So.2d 331 (Fla. 1978).

The failure of a litigant to raise a claim at trial or on direct appeal in accordance with the procedural requirements imposed by the state will preclude consideration of that claim by the federal district courts in a habeas corpus proceeding brought pursuant to 28 U.S.C. §2254. Wainwright v. Sykes, supra; Engle v. Isaac, 456 U.S. 107, 71 L.Ed.2d 783, 102 S.Ct. 1558 (1982), reh. denied, 73 L.Ed.2d 1296 (1982); Sullivan v. Wainwright, 695 F.2d 1306 (11th Cir. 1983); Hall v.

Alabama, 700 F.2d 1333 (11th Cir. 1983); Forman v. State, 633 F.2d 634 (2 DCA 1980), cert. denied, 450 U.S. 1001 (1981) and Grizzell v. Wainwright, 692 F.2d 722 (11th Cir. 1982). This is true whether the default occurred at trial and/or appeal and extends to constitutional as well as non-constitutional claims. Engle v. Isaac, supra.

Petitioner has consistently argued that the Second District Court of Appeal addressed the merits of Greenfield's claim only in the alternative, after first noting Greenfield's failure to object to the testimony of Officers Pilifant and Jolley. See Greenfield v. State, 337 So.2d 1021 (Fla. 2 DCA 1976). On remand the district court reaffirmed its original opinion and held that it was consistent with Clark v. State, supra. Since Clark expounds the

contemporaneous objection rule under discussion it is not reasonable to assume that the Second District Court of Appeal would find its decision consistent with Clark unless it had, in fact, considered Greenfield's claim not properly preserved for appellate review.

This Court has said:

> . . . it must be remembered that direct appeal is the primary avenue for review of a conviction or sentence . . . When the process of direct review -- which, if a federal question is involved, includes the right to petition this Court for a writ of certiorari -- comes to an end, a presumption of finality and legality attached to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials. Barefoot v. Estelle, __ U.S. __, 103 S.Ct. __, 77 L.ed.2d 1090, 1100 (1983).

The Eleventh Circuit's decision to

disregard the Wainwright v. Sykes bar and reach the merits of this cause flies in the face of this Court's concerns in Barefoot and requires an exercise of this Court's certiorari jurisdiction.

CONCLUSION

For these reasons, Petitioner respectfully urges this Court to grant certiorari and reverse the decision of the Court of Appeals in and for the Eleventh Circuit.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

Ann Garrison Paschall
ANN GARRISON PASCHALL
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

CERTIFICATE OF SERVICE

I, Ann Garrison Paschall, Counsel for Petitioner, and a member of the Bar of this Court, hereby certify that on the 18th day of March, 1985, I served three copies of the Petition for Writ of Certiorari on James D. Whittemore, Esq., Counsel for Respondent, 412 Madison Street, Suite 1207, Tampa, Florida 33602, by depositing with the United States Postal Service a duly addressed envelope with postage prepaid.

Ann Garrison Paschall
OF COUNSEL FOR PETITIONER

A P P E N D I X

David Wayne GREENFIELD, etc.,

Petitioner-Appellant,

v.

Louie L. WAINWRIGHT, etc., et al.,

Respondents-Appellees.

No. 83-3111.

United States Court of Appeals,

Eleventh Circuit.

September 6, 1984.

Petitioner sought habeas corpus relief following state court conviction. The United States District Court for the Middle District of Florida, William J. Castagna, J., denied relief, and he appealed. The Court of Appeals, Tjoflat, Circuit Judge, held that prosecutor's argument to jury that petitioner's postarrest silence showed him to be sane violated his Fifth and Fourteenth

Amendments right to a fair trial.

Reversed with instructions.

1. CRIMINAL LAW 1036.1(3)

Defendant's failure to object at trial to admission of his post*Miranda* warning silence as substantive evidence to rebut his insanity defense did not preclude his right to seek apellate review of the evidence's admissibility where he later made 20 objections to prosecutor's attempt to argue that evidence to the jury.

2. CRIMINAL LAW 407(1)

Defendant's post*Miranda* warning silence was inadmissible as substantive evidence to rebut his defense of insanity at time of offense, as it was not probative of defendant's sanity, and his assertion of insanity, through psychiatric testimony, made no reference to his conduct at

time of arrest and did not constitute perjury, so that door was not opened to prosecutor's use of his silence. U.S.C.A. Const.Amends. 5, 6

3. HABEAS CORPUS 113(12)

Court of Appeals must find a constitutional error harmless beyond reasonable doubt before it can affirm district court's denial of writ of habeas corpus.

Appeal from the United States District Court for the Middle District of Florida.

Before GODBOLD, Chief Judge, TJOFLAT and HENDERSON, Circuit Judges.

TJOFLAT, Circuit Judge:

David Wayne Greenfield was convicted after a jury trial in Florida state court of sexual battery committed with force likely to cause serious personal injury.

He was sentenced to life imprisonment. In this habeas corpus action, he raises one issue, whether the prosecutor's argument to the jury that Greenfield's post-arrest silence showed him to be sane violated his fifth and fourteenth amendments right to a fair trial. The district court denied relief; we reverse.

I.

On June 21, 1975, petitioner was walking on a path through the woods to Lido Beach, near Sarasota, Florida. He passed a young woman coming from the beach, who smiled and said something to him about the weather. After he passed her, he turned and choked her from behind, dragged her into the woods and forced her to engage in oral sex. Afterwards he made several inconsistent statements, among them: "I don't know why I did this. I

know why I did this." He smoked a cigarette that belonged to the woman and then found her car keys for her.

After Greenfield released her, the woman drove directly to the police station and made a report, describing petitioner's attire and saying that his legs were badly sunburned. An officer returned to the beach two hours after the assault and found petitioner walking on the beach. He told petitioner he was investigating a crime that had occurred on the beach and asked petitioner to raise his pants legs. Upon seeing that petitioner's legs were burned, he placed petitioner under arrest. Petitioner voluntarily walked to the police car and, after being advised of his Miranda rights, stated that he wanted to speak to an attorney. Otherwise he was silent. Later that day, when another

officer again advised petitioner of his rights and asked him if he wished to talk, petitioner only stated that he wanted to speak with an attorney. After speaking with a public defender, petitioner once again declined to talk with the police.

Petitioner was charged with sexual battery, Fla.Stat.Ann. §794.011(3)(1975), and pled not guilty. He later changed his plea to not guilty by reason of insanity. He went to trial on October 15, 1975. In petitioner's opening statement to the jury, his attorney indicated that he would put the prosecution to its proof of the events and, as a defense, would produce evidence of his client's insanity.

[1] In its case-in-chief, the prosecution called the victim, the investigating police officers, and the doctor who examined the victim shortly after the

assault. Two of the officers testified that petitioner had requested a lawyer after being advised of his Miranda rights, but had otherwise remained silent. The defense made no objection to this testimony.[1] At the close of the state's case petitioner moved for a judgment of acquittal. The court denied the motion.

The defense called two psychiatrists, Drs. Lose and Piotrowski, both of whom testified that petitioner had demonstrated classic symptoms of paranoid schizophrenia

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[1] Under these circumstances the petitioner's failure to object to the introduction of this evidence did not preclude his right to seek appellate review of the evidence's admissibility because he later made 20 objections to the prosecutor's attempt to argue the evidence to the jury. This can be inferred from the Florida District Court of Appeal's willingness to address the merits of the admissiblity issue during its review of the prosecutor's closing argument to the jury. See Greenfield v. State, 337 So.2d 1021, 1022-23 (Fla.Dist.Ct.App. 1976).

during their interviews with him. Each doctor stated that in his opinion petitioner was not able to distinguish right from wrong at the time of the alleged crime.[2] Dr. Lose mentioned that he had prescribed thorazine, a drug that diminishes the symptoms of schizophrenia, for petitioner while he was in prison. Schizophrenics can tolerate the drug in substantial amounts; normal individuals given such dosages become extremely drowsy. Petitioner responded positively to the treatment.

In rebuttal, the state called a psychiatrist who testified that in his

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2 In its charge to the jury at the end of the trial, the court instructed the jury to find the defendant legally insane if he was "by reason of mental infirmity unable to understand the nature of his act or its consequences or was incapable of distinguishing that which is right from that which is wrong."

opinion petitioner was not a paranoid schizophrenic and was able to distinguish right from wrong at the time he committed the offense. The psychiatrist based this opinion on his examination of petitioner, conducted while petitioner was under the influence of thorazine. He testified, however, that thorazine would have made petitioner's symptoms worse rather than better. After the rebuttal, petitioner renewed his motion for a judgment of acquittal, which was denied.

In his summation to the jury, the prosecutor presented, over petitioner's objection, the following argument:

> Let's go on to Officer Pilifant who took the stand, who the psychiatrists, both defense psychiatrists, never even heard about, never even talked to. He states that he saw this fellow [petitioner] on the beach and that he went up to him, talked to him, and then arrested him for the offense. The fellow voluntarily

put his arms behind his back and said he would go to the car. This is supposedly an insane person under the throws [sic] of an acute condition of schizophrenic paranoia at the time. He goes to the car and the officer reads him his Mranda [sic] rights. Does he say he doesn't understand them? Does he say "What's going on?" No. He says "I understand my rights. I do not want to speak to you. I want to speak to an attorney." Again an occasion of a person who knows what's going on around his surroundings, and knows the consequences of his act. Even down--as going down the car as you recollect Officer Pilifant said he explained what Miranda rights meant and the guy said--and Mr. Greenfield [the petitioner] said "I appreciate that, thanks a lot for telling me that." And here we are to believe that this person didn't know what he was doing at the time of the act, and then even down at the station, according to Detective Jolley--He's down there. He says, "have you been read your Miranda rights?" "Yes, I have." "Do you want to talk?" "No." "Do you want to talk to an attorney?" "Yes." And after he talked to the attorney again he will not speak. Again another physical overt indication by the defendant . . .

So here again we must take this in consideration as to his guilt or innocence, in regards to sanity or insanity.

The jury found the petitioner guilty as charged, and the judge sentenced him to life imprisonment. Petitioner moved the court for a new trial or judgment of acquittal notwithstanding the verdict, citing the prosecutor's comment on petitioner's post arrest silence. The court denied the motion.

Petitioner appealed his conviction to the Florida Second District Court of Appeal, contending in part that the trial court erred in denying his motion for a new trial based upon the prosecutor's use of petitioner's post-Miranda warning silence. The court affirmed the conviction. Greenvield v. State, 337 So.2d 1021 (Fla. Dist.Ct.App. 1976). The Florida Supreme Court granted certiorari and remanded the

case to the district court of appeal for further proceedings consistent with its decision in Clark v. State, 363 So.2d 331 (Fla. 1978).[3] The district court of appeal reaffirmed its original opinion. Petitioner then filed this petition for a writ of habeas corpus in the federal district court.

After hearing evidence regarding whether Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), barred consideration of the post-arrest silence issue, the magistrate recommended to the district court that the issue not be

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3 In Clark v. State, 363 So.2d 331 (1978), the Florida Supreme Court held that improper comments on the defendant's exercise of his right to remain silent is "constitutional error," but not "fundamental error." Accordingly, a contemporaneous objection at trial to the introduction of or comment upon such evidence is required to preserve the issue for appeal.

considered barred by Wainwright v. Sykes, since the state appellate court had reached the merits of petitioner's claim, but that it be dismissed on the merits. Petitioner timely filed objections to the recommendation. The district court adopted the magistrate's recommendations and denied the petition.[4] This appeal followed.

II.

In Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), the Supreme Court held that the prosecutor's use of the defendant's post-arrest, post-Miranda warning silence, not as evidence

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4 The district court made no findings of fact; rather, it determined from the record of his state trial proceedings that petitioner's claim was insufficient as a matter of law. Accordingly, we examine the record of the state trial proceedings, as did the district court, to determine whether petitioner was denied the constitutional right now in issue.

of guilt,[5] but solely to impeach the credibility of the defendant's alibi testimony violated the due process clause of the fourteenth amendment. The Court gave two reasons for its holding. First, a defendant's silence has low probative value because it is "insolubly ambiguous." 426 U.S. at 617, 96 S.Ct. at 2244. The ambiguity arises because Miranda

> require[d] that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says may be used against him, and that he has a right to retained or appointed counsel before submitting to interrogation Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these Miranda rights.

Id. Second, the Miranda warnings should

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5 Even the dissenters in Doyle agreed that the evidence was inadmissible to show guilt; in their opinion it could only be used to attack the defendant's credibility.

not be read to impose a hidden penalty on one who chooses to rely on them.

> [W]hile it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation [of the crime] subsequently offered at trial.

Id. at 618, 96 S.Ct. at 2245 (footnote omitted). These two concerns[6] provide

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6 The problem of the extent to which a person can be compelled to incriminate himself testimonially without fifth amendment protection, see Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966)(fifth amendment does not protect defendant against compelled "self-incrimination" by seized blood sample), is related. Petitioner's silence here should not be analyzed as behavior showing physical evidence of sanity. Unlike the physical evidence in Schmerber (blood), silence is inextricably tied to the testimonial option which the fifth amendment protects, that is, the option

the framework within which we must judge petitioner's claim.

The Supreme Court has placed some gloss on the right articulated in Doyle. In Doyle itself the Court noted that testimony that a defendant had remained silent would be admissible to rebut the defendant's story that he had spoken with police after his arrest. In Jenkins v. Anderson, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980), the Court held that the admissibility of pre-arrest, pre-Miranda warning silence to impeach the defendant's

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not to incriminate oneself testimonially. Silence may not technically be "testimonial" or "communicative"; however, neither is it physical evidence. It occupies a unique place in that it shows a mental decision not to be testimonial or communicative. If such "conduct" is not protected, no fifth amendment protection would exist. There would be no alternative to self-incrimination. One would simply choose whether to incriminate himself by inference from silence, or by verbal means.

testimony in a state court proceeding is a state evidentiary law question; admission of the evidence would not violate the U.S. Constitution because the implicit assurance of the Miranda warning was not present In Fletcher v. Weir, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982), the Court similarly held that the admissibility of post-arrest, but pre-Miranda warning statements to impeach the defendant's testimony did not violate the fourteenth amendment but was rather a state evidentiary decision. The Court has not discussed the issue we now face: the admissibility of a defendant's post-Miranda warning silence when offered not to impeach, but, rather, as substantive evidence to rebut his defense of insanity at the time the offense. In evaluating this claim, we first examine the extent to

which the two factors relied upon by the Doyle court are present in this case.

A.

[2] We first examine the probative value of the evidence. The State argues here that petitioner's silence and request for a lawyer was highly probative of his sanity. We are not convinced.

Insanity is a broad term convering a variety of mental and emotional diseases or defects that prevent the criminal from formulating the requisite punishable intent when he commits a criminal act. The level of lucidity under which an insane person operates may vary with time. Symptoms of insanity also vary widely, with the specific disease and with time, ranging from complete withdrawal (which is often marked by silence) to violent rages. A person's apparent level of comprehension

may not always correspond to his level of sanity at the time. Accordingly, the probative value of a person's post-arrest, post-Miranda warning silence in determining his sanity at the time of the crime will vary markedly with the disease he has, the symptoms he tends to exhibit, and the closeness in time between the arrest and warning and the crime.

Here two psychiatrists considered petitioner to be a paranoid schizophrenic. At trial, psychiatric testimony suggested that such a person is often quiet. Paranoid schizophrenics, the doctors noted, are often capable of spawning complex, rational plans of action, although they operate under delusions. For example, the State's psychiatrist noted that a paranoid schizophrenic might dream up an elaborate, coherent plan to murder his neighbor,

based on the delusion that the neighbor was a KGB agent trying to assassinate him. For petitioner to have consistently asked for a lawyer and refused to speak with police, then, might only reflect his paranoia that the authorities were persecuting him even though he was innocent.

As the Supreme Court of Florida noted in finding post-arrest, post-Miranda warning silence not probative of insanity:

> [T]hese ambiguities attendant to post-Miranda silence do not suddenly disappear when an arrestee's mental condition is brought into issue . . [o]ne could reasonably conclude that custodial interrogation might intimidate a mentally unstable person into silence. Likewise, an emotionally disturbed person could be reasonably thought to rely on . . . a Miranda warning.

State v. Burwick, 442 So.2d 944, 948 (Fla. 1983), cert. denied, __ U.S. __, 104 S.Ct. 1719, 80 L.Ed.2d 191 (1984). In this case, the evidence was probative only

of petitioner's ability to understand English[7] and to remain calm, which would be consistent with the mental disease of paranoid schizophrenia. The evidence accordingly was not probative of petitioner's sanity.

B.

We next turn to the concern expressed by the Supreme Court in Doyle that the defendant not be penalized for exercising his right to silence in view of the implicit assurance the Miranda rights give that, if the arrestee chooses not to speak, his silence will not be used against him. This concern was reiterated

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[7] Had petitioner's particular disorder been that he considered himself to be the literary Don Juan and understood only Spanish when he was in a delusional period, the probative value of his response to the officer's English warnings would have been much higher.

in Fletcher, 455 U.S. at 607, 102 S.Ct. at 1312, where the Court stated that "the sort of affirmative assurance embodied in the Miranda warnings" gives rise to a due process violation when post-warning silence is used by the prosecutor.

We first note that nothing in the Miranda "assurances" given to petitioner limited them to the instance where guilt, rather than insanity, would be the trial issue. In this respect petitioner's situation was identical to that of Doyle. Petitioner's silence was used against him at trial after he asserted his right to silence. He received no prior indication that he could be so penalized for maintaining silence; indeed, in the Miranda warnings he was implicitly assured that he would not be so penalized.

Further, petitioner's silence was not

admissible under the well-established exception noted in Doyle, that otherwise inadmissible evidence may come in where the defendant takes the stand and perjures himself regarding such evidence, 426 U.S. at 619, n. 11, 96 S.Ct. at 2245, n. 11; for petitioner never testified that he did not remain silent. Petitioner's assertion of insanity, through psychiatric testimony, made no reference to his conduct at the time of the arrest, did not constitute perjury, and therefore did not open the door to the prosecutor's use of post-Miranda silence as permitted by Doyle.

C.

Having examined both factors emphasized by the Doyle Court in the context of the facts before us, we discuss how they should be synthesized. The Seventh and Tenth Circuits, in analyzing similar

situations, have decided that the Doyle decision is inapposite in the context of an insanity defense. The Seventh Circuit has so held explicitly, Sulie v. Duckworth, 689 F.2d 128 (7th Cir. 1982), cert. denied, __ U.S. __, 103 S.Ct. 1439, 75 L.Ed.2d 796 (1983); the Tenth Circuit, in United States v. Trujillo, 578 F.2d 285 (10th Cir. 1978), cert. denied, 439 U.S. 858, 99 S.Ct. 175, 58 L.Ed.2d 166 (1978), has implicitly agreed.[8]

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[8] It is interesting to note that the two cases Trujillo relied on for its conclusion that post-Miranda silence or requests for a lawyer are admissible to show sanity do not directly support that conclusion. One, United States v. Julian, 450 F.2d 575 (10th Cir. 1971), specifically states that admission of post-arrest silence to show mental competence would have "a completely false premise in fact or law." Id. at 579. The court permitted evidence of the defendant's conduct at the time of his arrest only when the defense psychiatrist testified that the defendant "was trying to be arrested," because the

In Trujillo, a government agent testified that he read Trujillo his Miranda rights, Trujillo requested a lawyer, the agent continued to question Trujillo, and Trujillo told the agent his name, social security number, education, and parents' addresses. The government apparently never argued at trial that Trujillo's responses should be considered evidence of his sanity. The court of appeals determined, however, that the evidence was properly admitted because it was pertinent to the insanity claim, noting that in these circumstances, including that "the government did not exploit post-arrest silence,"

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defendant's conduct tended strongly to show that he was not trying to be arrested. In the second case, United States v. Coleman, 501 F.2d 342 (10th Cir. 1974), the defendant never challenged the admission of his post-arrest silence and request for a lawyer. Both of these cases were decided prior to Doyle.

the danger of unfair prejudice [was] minimal and the probative value substantial." Id. at 288.

The Sulie court employed a more lengthy analysis. There, the prosecutor called an officer to testify that the petitioner, after receiving the Miranda caution, requested a lawyer. The evidence was used to show that the petitioner was sane at the time he committed the crime. The court of appeals used a two-prong test in approving the evidence. First, it decided without examining the particular circumstances of that defendant's illness that the probative value, to show petitioner's sanity, of the evidence that petitioner requested a lawyer was "great." 689 F.2d at 131. Second, it examined "how much the exercise of the right to remain silent would be deterred if a suspect knew

that a request for a lawyer could be used as evidence of his sanity." Id. at 130. The court concluded that, since few defendants raise an insanity defense and fewer still are planning their defenses when they are arrested, the suspect's knowledge that his request for a lawyer could be used against him to show his sanity would have only a slight inhibiting effect on the exercise of the right to counsel. Noting that the prosecution needed all the evidence of sanity it could get, the court found the testimony to have been properly admitted.

We disagree with the conclusion of both appellate courts that evidence of a post-Miranda warning silence or counsel request is generally highly probative of sanity at the time of the offense. We also disagree with the appropriateness,

after Doyle, of the Sulie court's second inquiry.

The Sulie court analyzed the probative value of the request as follows: "Where evidence that the defendant asked for a lawyer is used to prove . . . guilt, its probative value is slight (it is not true that only a guilty person would want to have a lawyer present when he was being questioned by the police); but here it was great." 689 F.2d at 131. The flaw in this logic--as the record in this case shows--is that it is not necessarily true that only a sane person wants a lawyer present when he is being questioned by the police. An excessively paranoid individual, in particular, may want any protection from the police that he can get. As we have previously stated, probative value of the conduct to show sanity in part

depends on the nature of the alleged insanity, and, in most circumstances, we cannot conceive that the probative value as to sanity would be significantly greater than the probative value as to guilt or as to credibility in asserting an alibi defense.

The second point analyzed in Sulie, what impact use of post-Miranda conduct to show sanity may have on criminal suspects in general, sidesteps the point made in Doyle. The particular suspect, having been implicitly assured that his silence will not be used against him at all and quite likely relying on that assurance, is penalized at trial for exercising his right to remain silent when his silence is used against him as evidence of his sanity. It might well be that, if suspects were told that their post-Miranda warning

silences could be used to show their sanity, most suspects would pursue the same course of action. However, until and unless we correctly set out for the particular suspect how his right is limited, we penalize him for exercising his right to silence by an after-the-fact assertion of a limitation on the right. We agree with Judge Cudahy's dissent in Sulie that the appropriate inquiry in this type case is not whether defendants generally will be inhibited from exercising their fifth amendment rights, but rather whether the particular defendant has been penalized for exercising such rights and whether he has been harmed by the penalty. This is consistent with the position taken by the Supreme Court in Doyle, where the Court focused on whether Doyle himself had been harmed, not on the broad inhibitory

effects on the right to remain silent. Similarly, in Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), the Court held that a prosecutor could not comment on a defendant's failure to testify at trial because it imposed a penalty on his exercise of his fifth amendment privilege not to incriminate himself. 380 U.S. at 619, 85 S.Ct. at 1232. The Court did not look at the inhibitory effect of prosecutorial comment on defendants exercising the right generally. The Third Circuit described the proper inquiry to be "whether the particular defendant has been harmed by the state's use of the fact that he engaged in constitutionally protected conduct, not whether, for the particular defendant or for persons generally, the state's reference to such activity has or will burden

the exercise of the constitutional right." United States ex rel. Macon v. Yeager, 476 F.2d 613, 616 (3rd Cir.), cert. denied, 414 U.S. 855, 94 S.Ct. 154, 38 L.Ed.2d 104 (1973) (emphasis in original).

In this case, we feel that adherence to the Doyle analysis is appropriate and that it requires us to send petitioner back to the state courts for retrial. Petitioner exercised his rights to remain silent and to request counsel. He did so in circumstances having no more probative value as to sanity than the circumstances in Doyle had as to guilt; in both situations the silence was "insolubly ambiguous." Petitioner exercised his rights to silence and to counsel after receiving the same implicit assurance Doyle received that his silence would not be used against

him.

Moreover, as we have pointed out, unlike in Doyle, petitioner did not take the stand. Any use of his silence was as substantive evidence against him, a use that even the Doyle dissenters would have decried. This case can not fall under the exception of a defendant using the fifth amendment as a shield for perjury because the defendant never took the stand. His experts likewise did not place his conduct at the time of his arrest directly in issue in the opinions they expressed.[9]

[3] We now turn to the question of whether the prosecutor's argument

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[9] We do not determine, here, if or when such silence might appropriately be used to impeach on cross-examination a defense psychiatrist who raised the defendant's behavior with police at the time of or after his arrest and Miranda warning as evidence of insanity. We note only that this issue is not presented in this case.

constituted harmless error. We must find a constitutional error harmless beyond a reasonable doubt before we can affirm the district court's denial of the writ. See Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The prosecutor relied strongly on the petitioner's conduct as evidence of sanity; his closing argument was not lengthy and the portion challenged here was not minor. We cannot say that the error was harmless beyond a reasonable doubt.

The judgment of the district court is reversed. On remand, the district court shall issue the writ, calling for the state to retry the petitioner within a reasonable time (to be determined by the district court) or to discharge him.

REVERSED, with instructions.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DAVID WAYNE GREENFIELD,
#051271,

Petitioner,

vs CASE NO. 80-290-CIV.T.WC.

LOUIE L. WAINWRIGHT,
Secretary, Department
of Corrections, State
of Florida,

Respondent.

REPORT AND RECOMMENDATION

THIS CAUSE came on for consideration of a petition for writ of habeas corpus filed by as State prisoner, DAVID WAYNE GREENFIELD, pro se, in forma pauperis, pursuant to 28 U.S.C. §2254.[1]

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[1] This matter comes before the undersigned pursuant to the Standing Order of this Court dated April 6, 1979. See also Local Rule 6.01(c)(17).

On June 26, 1975 in Case No. 75-425-CF-A-01 in the Circuit Court in and for Sarasota County, Florida, Petitioner was charged by information with sexual battery committed with force likely to cause serious personal injuyr, contrary to §794.02 (2), Fla. Stat. (1975). On October 15, 1975, Petitioner was convicted after jury trial. He was adjudicated guilty and on November 21, 1975 was sentenced to life imprisonment.

Petitioner originally entered a plea of not guilty. Subsequently, his attorney entered a change of plea to not guilty by reason of insanity.

On October 16, 1975, Petitioner filed a motion for new trial or in the alternative for a judgment notwithstanding the verdict. He argued that the court had erred in allowing the prosecutor to

comment on the defendant's refusal to give a statement to police officers after the defendant was advised of his Miranda warnings and right to remamin silent. The trial court, after hearing argument, denied the motion.

On direct appeal, Petitioner contended that the trial court erred in refusing to grant a motion for new trial on the ground that the prosecutor had commented on his exercise of his right to remain silent during closing argument. The Second District Court of Appeal affirmed Petitioner's conviction with a written opinion. See, Greenfield v. State, 337 So.2d 1021 (2d DCA 1976); rehearing denied October 25, 1976. The Florida Surpeme Court, upon a petition for writ of certiorari, granted certiorari and remanded the case back to the Second District Court of

Appeal for further proceedings consistent with its decision in Clark v. State, 363 So.2d 331 (Fla. 1978). See Greenfield v. State, 364 So.2d 885 (Fla. 1978). Thereafter the Second District Court of Appeal affirmed its original opinion. See, Greenfield v. State, unreported Order entered October 1, 1979, copy in file.

This petition for writ of habeas corpus followed. Counsel was appointed to represent the indigent Petitioner and a Pre-Trial Stipulation was entered. Respondent does not contend that Petitioner has failed to exhaust available State remedies.

The sole issues raised by the parties are:

a. Whether Petitioner was denied due process of law by the prosecutor's use of and reference to defendant's post-

silence during 1) trial and 2) final argument; and

b. Whether the holding in Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), bars review of Petitiner's claim.

The facts in this case, simply stated, are that Petitioner, identified and arrested shortly following a sexual assault, upon receiving Miranda warnings, requested an attorney and made no statement. The prosecutor elicited testimony of the officer disclosing Petitioner's request for counsel in an attempt to overcome Petitioner's defense of insanity. Petitioner claims violation of his rights under Doyle v. Ohio, 426 U.S. 610 (1976). Respondent claims an exception to the Doyle rule under Harris v. New York, 401 U.S. 222 (1971).

Only one fedeal appellate court panel has met this issue squarely. In Sulie v. Duckworth, __ F.2d. __ (7th Cir. 1982), 32 Cr.L. 4046, under material facts the same as in the instant case, the court held the state may show that a defendant who raises the insanity defense was sufficiently lucid to ask for a lawyer, outweighing the slight effect this testimony will have on the constitutional right of silence. (A copy of the Sulie opinion is attached hereto as Appendix 1). Based on the Sulie decision, and the reasoning of the majority expressed therein, I recommend that the petition be DENIED.[2]

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2 Failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days from the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal. 28 U.S.C. 636(b)(1). Local Rule 6.02; Nettles v. Wainwright, 677 F.2d 404, (5th Cir. 1982)(en banc).

Respondent also seeks dismissal of Petitioner's claim for failure to object at time of trial. The record is clear that the Petitioner did object to the prosecutor's closing argument reference to Petitioner's request for counsel and failure to make any other statement. The record is further clear that the Florida Second District Court of Appeals reached the merits of Petitioner's claim both in the original opinion and upon remand. Accordingly, the Petitioner is not barred from raising the issue in this Court.

This 29th day of October, 1982.

[s]
PAUL GAME, JR.
UNITED STATES MAGISTRATE

(Appendix one to Magistrate Game's opinion is omitted by Petitioner.)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DAVID WAYNE GREENFIELD,

Petitioner,

vs. CASE NO. 80-290-CIV-T-WC

LOUIE L. WAINWRIGHT,

Respondent.

ORDER

This cause came on for consideration of a petition for writ of habeas corpus filed by a State prisoner, David Wayne Greenfield, pro se, in forma pauperis, pursuant to 28 U.S.C. §2254.

The matter was considered by the United States Magistrate, pursuant to general order of assignment, who has filed his report recommending that the petition be denied.

Upon consdieration of the report and

recommendation of the Magistrate and upon this Court's independent examination of the file, the Magistrate's report and recommendation is adopted and confirmed and made a part hereof. Therefore, it is

ORDERED:

1. The petition for writ of habeas corpus is denied.

DONE AND ORDERED at Tampa, Florida this 25th day of January, 1983.

[s]
WILLIAM J. CASTAGNA
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING
PETITION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT
JULY TERM, A.D. 1976

DAVID WAYNE GREENFIELD,

Appellant,

v. CASE NO. 75-1731

STATE OF FLORIDA,

Appellee.

Opinion filed September 24, 1976

Appeal from the Circuit
Court for Sarasota County;
Roy E. Dean, Judge.

Jack O. Johnson, Public Defender,
Robert H. Grizzard, II, Assistant
Public Defender, and Paul J. Martin,
Legal Intern, Bartow, for Appellant.

Robert L. Shevin, Attorney General,
Tallahassee, and William I. Munsey,
Jr., Assistant Attorney General,
Tampa, for Appellee.

McNULTY, Chief Judge.

On this direct appeal appellant

Greenfield assails his conviction of sexual battery. The sole issue on appeal relates to the denial of a motion for new trial predicated on the ground that the prosecutor prejudicially commmented in summation on appellant's exercise of his right to remain silent at the giving of his Miranda rights at the time of his arrest. We affirm.

Most significantly, in this case, appellant pleaded not guilty by reason of insanity. Accordingly, there was no real dispute as to the essential objective facts herein. They are that the prosecutrix, having sunned hereself on a local beach in Sarasota in the late morning or early afternoon on the day of the offense, was returning to her car because of the threat of rain. It was necessary that she pass through a wooded area bordering the

beach. While in this wooded area she was accosted by appellant and dragged to a more secluded area of the beach where the sexual assault occurred. Upon her release by appellant the prosecutrix drove immediately to the police station and reported the incident, describing appellant. A police officer promptly returned to the scene of the assault and in the vicinity thereof spotted appellant as one fitting in considerable detail the description given by the prosecutrix. He arrested appellant and read him his Miranda rights.

The officer testified that he explained these rights, that appellant thanked him for explaining the, and that appellant said he understood them and did not wish to speak to the officer until he spoke to an attorney. Shortly thereafter at the police station appellant was again

interviewed by other officers, again reminded of his rights and again he reiterated that he did not wish to speak to the officers, that he wanted to speak to an attorney. In fact, he was permitted to and did call an attorney. No objection was made to the introduction of this evidence relating to the giving of the Miranda rights and to appellant's responses thereto.

During closing arguments, however, the prosecutor made the following comments:

> "But let's go on from what she stated. Let's go on to Officer Pilafant who took the stand, who the psychiatrists, both defense psychiatrists, never even heard about, never even talked to. He states that he saw this fellow on the beach and that he went up to him, talked to him and then arrested him for the offense. The fellow voluntarily put his arms behind his back and said he would go to the car.

This is supposedly an insane person under the throes of an acute condition of schizophrenic paranoia at the time. He goes to the car and the officer reads him his Miranda rights. Does he say he doesn't understand them? Does he say 'What's going on?' No. He says 'I understand my rights. I do not want to speak to you. I want to speak to an attorney.' Again an occasion of a person who knows what's going on around his surroundings, and knows the consequences of his act. Even down--as going down [in] the car as you recollect Officer Pilafant said he explained what Miranda rights meant and the guy said--and Mr. Greenfield said 'I appreciate that, thanks a lot for telling me that.' And here we are to believe that this person didn't know what he was doing at the time of the act, and then even down at the station, according to Detective Jolley--he's down there. He says, 'Have you been read your Miranda rights?' 'Yes, I have.' 'Do you want to talk?' 'No.' 'Do yo want to talk to an attorney?' 'Yes.' And after he talked to the attorney again he will not speak. Again another physical overt indication by the defendant."

At this point, counsel for defendant

strenuously objected on the basis that such comments were improper references to appellant's insistence on his Fifth Amendment right to silence. We cannot agree.

While we do agree that, at least in the face of an objection, testimony or prosecutorial comment relating to a defendants insistence on his right to remain silent generally constitutes reversible error,[1] we are of the view that under the circumstances of this case the general rule ought not apply.

When insanity is raised by plea as a defense, and evidence thereof is forthcoming prima facie sufficient to raise a

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[1] Shannon v. State (Fla. 1976), __ So.2d __ (Case No. 47-611, Opinion filed June 30, 1976); Bennett v. State (Fla. 1975), 316 So.2d 41; Clark v. State (Fla. App. 2d, 1976) __ So.2d. __ (Case No. 74-889, Opinion filed July 28, 1976).

reasonable doubt, the state no longer can travel on the presumption of sanity; it must establish sanity beyond a reasonable doubt as with every element of the offense charged.[2] Certainly, evidence of the conduct and apparent state of mind and awareness of an accused, particularly where, as here, it is connected closely in point of time to the crime charged, is relevant to this issue; and it would be manifestly unfair to permit a defendant prima facie to establish a defense and then preclude the state from meeting it by barring relevant evidence to the contrary because of the "Miranda" rationale.[3]

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2 See, e.g., Farrell v. State (Fla. 1958), 101 So. 2d 130; Byrd v. State (Fla. App. 2d, 1965), 178 So.2d 886.

3 Cf. Harris v. New York (1971), 401 U.S. 222, 91 S.Ct. 643.

Here, for example, the evidence relied upon by the state was perhaps the most competent evidence on appellant's mental capacity at the time of the offense available, being so closely connected to the res gestae. It was neither unfair to introduce it[4] nor improper to comment upon it in summation; and, though considered in a somewhat different context (i.e., with respect to a defendant's right to silence during a psychiatric evaluation ordered by the court), we concur with the

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4 No issue is made herein about the postural sequence in which the evidence came in. That is, the evidence came in during the state's case in chief before there was any evidence from the appellant as to his insanity. But no objection was made at the time. So, by objecting to prosecutorial comments thereon during summation, the appelalnt is in no different position than he would have been in had such evidence been introduced in rebuttal, when it would have been, as we hold here, proper.

observations of Mr. Justice Adkins in Parkin v. State:[5]

> "When the plea of not guilty by reason of insanity was entered, it was done so with knowledge of the existing statutes and case law on the subject. There is no constitutional right to plead this defense, and, if the statutes and case law permit a defendant the privilege of raising it, he must waive certain constitutional rights with respect to it, including the privilege against self-incrimination. . .

In view whereof, the judgment and sentence appealed from should be, and they are hereby, affirmed.

HOBSON, J., CONCURS.

GRIMES, J., DISSENTS WITH OPINION.

GRIMES, J.,dissenting.

There is considerable logic in Judge McNulty's opinion. Yet, it is an appreciable step beyond Harris v. New York in

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5 (Fla. 1970), 238 So.2d 817.

which the U.S. Supreme Court held that when a defendant took the stand he could be cross-examined on inconsistent statements he had given to the police in violation of his Miranda rights. That decision was based upon the premise that a person should not be entitled to commit perjury and at the same time hide behind the constitutional right to remain silent.

Here, there is no question of perjury because the appellant did not take the stand, and I canot equate interposing a defense of insanity with the giving of perjured testimony. The testimony of Officer Pilafant, had it been objected to, and the comments of the prosecutor in closing argument, which were objected to, would require reversal under Bennett v. State, supra. The fact that this evidence was probative on the sanity issue cannot

deprive appellant of his constitutional protections.

Moreover, had the state been conscious of the possibility that Pilafant's testimony might result in a violation of Miranda principles, the problem could have been avoided with a minimum of prejudice to the state's case. The questions and answers could have been couched in such a manner as to permit the officer to convey to the jury the fact that the appellant carried on a perfectly rational conversation without specifically stating that he chose to avail himself of his right to remain silent.

In view of the present posture of the law on this subject, I must respectfully dissent.

IN THE SUPREME COURT OF FLORIDA
TUESDAY, SEPTEMBER 12, 1978

DAVID WAYNE GREENFIELD,

Petitioner,

v. CASE NO. 50,565

STATE OF FLORIDA, DISTRICT COURT OF APPEAL, SECOND DISTRICT 75-1731

Respondent

ORDER

This cause is before us on petition for writ of certiorari to review the decision of the District Court of Appeal in Greenfield vs. State, 337 So.2d 1021 (Fla. 2 DCA 1976). Certiorari is granted and this case is remanded for further proceedings consistent with our recent decision in Clark v. State, Case No. 50,336 (opinion filed July 28, 1978).

ENGLAND, C.J., OVERTON, SUNDERBERG, HATCHETT and ALDERMAN, JJ., Concur
ADKINS and BOYD, JJ., Dissent

A True Copy cc: Hon. William A. Haddad,
Clerk
TEST: Hon. R.H. Hackney, Jr.,
by: [s] Clerk
Chief Deputy Hon. Roy E. Dean, Chief
Clerk Judge

Sid J. White Hon. Jack O. Johnson
Clerk William I. Munsey, Jr.
Supreme Court Esquire
Mr. David Wayne Greenfield

IN THE SECOND DISTRICT COURT OF APPEAL
LAKELAND, FLORIDA

OCTOBER 1, 1979

DAVID WAYNE GREENFIELD,

Appellant,

v. CASE NO. 75-1731

STATE OF FLORIDA,

Appellee.

Pursuant to the order of the Florida Supreme Court remanding this case for further proceedings consistent with Clark v. State, 363 So.2d 331 (Fla. 1978), and it appearing that this court's decision in the above-styled case is consistent with Clark v. State, supra, upon consideration, it is

ORDERED that this court's prior affirmance herein is hereby adhered to.

A TRUE COPY
TEST:

[s] William A. Haddad

CLERK, DISTRICT COURT OF APPEAL
SECOND DISTRICT

cc: Jack O. Johnson
Attorney General
Hon. R.H. Hackney, Jr.
David Greenfield
Hon. Sid J. White